Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 05-311

COMMENTS OF CITY OF LANSING, MICHIGAN

The City of Lansing, Michigan (the "City") appreciates the opportunity to file comments on the Commission's Second Further Notice of Proposed Rulemaking ("FNPRM") in the above-referenced docket. For the reasons discussed herein, the City is very concerned about the Commission's tentative conclusions in the FNPRM that cable-related in-kind contributions should be treated as franchise fees and that local governments have no authority regarding cable operators' use of the rights of way to provide non-cable services, and we oppose these conclusions. The Commission should be aware that Michigan has a unique Constitutional grant of franchising authority to local municipalities, and Michigan's Legislature has enacted a series of telecom regulatory statutes that carefully govern within that structure. The Commission's proposed actions threaten to upend settled law and expectations in Michigan and for the City.

First, it is important to note that Michigan's constitution assigns to local units of government the exclusive right to regulate use of the local rights of way and to require franchises to conduct business therein:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly

> constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

MI Const. 1963, Art. VII, Sec. 29.[1] Michigan's courts have interpreted this language to include cable operators among the "public utilities" covered under this provision. In 2006, Michigan passed the Uniform Video Services Local Franchise Act (Act 480), which put in place a uniform form of video services franchise (the "Uniform Franchise"), set limits on franchise fees and fees for public, educational and governmental ("PEG") access channels, and imposed a number of other restrictions on local franchising authorities. The City of Lansing has issued Uniform Franchises to four different video service providers under Act 480 since that time.[2] No providers have complained to the City, nor to the City's knowledge to the Michigan Public Service Commission ("MPSC"), about the terms of those franchises nor about the fees or other provisions required under those Uniform Franchises. Nor have the terms of the franchise or the franchising process proved to be any impediment to multiple providers seeking and obtaining franchises with the City. The City of Lansing respectfully suggests that based on its experience, this is a solution to a problem that does not exist. Therefore, there is no need to upend the settled law in Michigan.

In the FNPRM, the Commission seeks comment on whether there are "other requirements besides build-out obligations that are not specifically for the use or benefit of the LFA or an entity designated [by] the LFA and therefore should not be considered contributions to an LFA." p. 12. The Commission's question implies that build-out requirements are

[1] Without having conducted research to confirm this, we believe that this provision may perhaps be unique among the States and is therefore worthy of particular note.

[2] The City has issued Uniform Franchises to Comcast of Michigan, LLC; Westphalia Broadband, Inc., d/b/a Comlink; Michigan Bell Telephone Company, d/b/a AT&T Michigan; and Arialink Telecom, LLC.

substantively different from the PEG channel requirements for educational institutions, for instance. The City disagrees. Under both the Federal Cable Act[3] and the Michigan Act[4] it is the City's responsibility to identify the community's cable needs and interests and to undertake to have the providers meet those needs in their franchises. This is wholly apart from the issue of franchise fees under each statute.[5]

Under the terms of the three Uniform Franchises that the City has with providers, the providers enable access for seven PEG channels on their systems: two operated by Michigan State University, one operated by Lansing Community College, one operated by the Lansing public schools, one public access channel, one "Good News Service" religious public access channel, and one governmental channel operated by the City of Lansing. Thus, the City itself operates only one of the seven channels, but the others provide significant benefits to the community and to educational institutions in the community.

If a build-out requirement was identified for a provider, it would be for a constituency (that is, a neighborhood, for instance) identified by the City through a community needs identification process. The same is true for each of the PEG channels – each serves a need brought to the attention of the City by some portion of the community. The City then requires this channel in its franchise in response to the community need.[6] This does not mean that the City itself is the direct beneficiary of what the service provider is required to provide under the franchise, but it does mean that in each case it is the City who is responsible for identifying the need and requiring that the need be met. The process is the same for build-out and for PEG channels, and there is no principled basis for treating a PEG channel requirement as a franchise

[3] 47 U.S.C. § 546
[4] MCL 484.3306(8)(c)
[5] See 47 U.S.C. § 542 and MCL 484.3306(1).
[6] It should be noted that Michigan's Act 480 imposes on the City a number of requirements the City must meet before it can require a new PEG channel from a provider. See MCL 484.3304.

fee when a build-out requirement is not. In fact, the correct way to regard both is the way they are currently both handled. That is, both should be exempt from being considered equivalent to a franchise fee.

The City notes that its providers pay limited PEG fees in support of these channels, as allowed under Michigan's law. MCL 484.3306(8). Under Michigan law, these payments are treated separately from the five percent franchise fee, and the Commission should leave this state law determination undisturbed. Under the Michigan Act, all fees are identified and passed through directly to customers as a line-item on their bill. See MCL 484.3307(c). Given that, it would be inappropriate for the provider to then deduct a portion of those fees in an attempt to recover them a second time from the City after its customers have paid them.

The City is concerned about the Commission's understanding of "in-kind" contributions. We note that the legislative history of the Cable Act explains that:

> Subsection 622(g)(2)(C) establishes a specific provision for PEG access in new franchises. In general, this section defines as a franchise fee only monetary payments made by the cable operator, and does not include as a "fee" any franchise requirements for the provision of services, facilities or equipment. As regards PEG access in new franchises, payment for capital costs required by the franchise to be made by the cable operator are not defined as fees under the provision. These requirements may be established by the franchising authority under Section 611(b) or Section 624(b)(1). In addition, any payments which a cable operator makes voluntarily relating to support of public, educational and governmental access and which are not required by the franchise would not be subject to the 5 percent franchise fee cap.

See H.R. Rep. No. 98 934 at 65 (1984) reprinted in 1984 U.S.C.C.A.N. 4702; see also 1984 U.S.C.C.A.N. at 4753 (Colloquy between Rep. Wirth and Rep. Bliley). This legislative history is cited in 1999 correspondence from the Commission's Cable Services Bureau with the City of Bowie, Maryland (letters of May 18, 1999 and June 25, 2999). We urge the Commission not to reverse these reasonable conclusions and upend settled expectations. This is particularly

important where State law has been enacted based on these understandings, multiple franchises have been issued, and providers have been operating without controversy under those franchises. In such circumstances, the Commission's actions risk creating significant confusion and controversy where little or none currently exists.

For the reasons cited herein, the City of Lansing opposes the Commission's proposal to interpret non-fee, in-kind cable requirements as franchise fees and to allow them to be deducted from the five percent fee cap. At a minimum, the Commission should continue its policy of limiting its decisions affecting local franchising authority to those jurisdictions where state law has not already addressed video franchising, and so avoid encroaching on existing state law and constitutional rights, thereby avoiding creating confusion and controversy where none previously existed.

Respectfully submitted,

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